

**LICENSE AGREEMENT BETWEEN
ERIE CANAL HARBOR DEVELOPMENT CORPORATION
AND OPERATOR**

This LICENSE AGREEMENT (the "Agreement" or the "License") made as of _____, 2023, between the ERIE CANAL HARBOR DEVELOPMENT CORPORATION ("ECHDC"), a subsidiary of New York State Urban Development Corporation d/b/a Empire State Development ("ESD"), having an office at 95 Perry St, Buffalo, New York 14203, and _____ ("Operator"), having an office at _____.

WITNESSETH:

WHEREAS, on January 19, 2023, the ECHDC issued a request for proposals ("RFP") seeking qualified firms to manage public space on certain Buffalo Waterfront property owned and/or managed by the ECHDC in the City of Buffalo; and

WHEREAS, the Operator submitted a proposal in response to the RFP on April 20, 2023 that was selected by the ECHDC Board of Directors at its meeting on October _____, 2023; and

WHEREAS, the Parties wish to enter into an Agreement to permit the Operator to manage public space, provided such use is consistent with the operations of the Buffalo Waterfront and consistent with the conditions of the property; and now

It is hereby mutually agreed by and between the parties hereto that this is made upon the agreements, terms, covenants, and conditions hereinafter set forth.

Section 1. Contract Documents

- (a) This Agreement is comprised of the following documents, all of which are hereby incorporated by reference:
 - (i) this Agreement
 - (ii) RFP dated January 19, 2023 and any addenda thereto (the "RFP") attached hereto
 - (iii) Operator's Proposal and Proposal Form (collectively the "RFP Response") dated April 20, 2023 attached hereto
 - (iv) Attachments and Exhibits
 - (v) Schedule A
- (b) In the event of any inconsistency in or conflict among the document elements of the Agreement identified herein, such inconsistency or conflict shall be resolved by giving precedence to the documents in the following order:
 - (i) this Agreement, including all attachments and exhibits
 - (ii) Schedule A

- (iii) RFP Response
- (iv) RFP and any addenda thereto

Section 2. Term

The term of this License shall commence on April 1, 2024 ("Commencement Date") and terminate on March 31, 2031 (the "Term"), unless terminated sooner pursuant to the provisions of this License.

Prior to the term of this License, a "Start Up" period will allow the Operator to hire key staff and prepare for the 2024 Summer Season. The "Start Up" period shall commence on the date of signature and terminate on March 31, 2024.

At the end of the Term, the ECHDC shall have the option to enter into one (1) additional 4-year extension (the "Extended Term"). The Extended Term would expire on March 31, 2035.

Section 3. Grant of License

- (a) ECHDC hereby grants the Operator the exclusive right to manage the public space as described in the RFP and proposed in the RFP Response (the "Permitted Use") in the area depicted as "locations" on the attached Exhibit C ("Premises Map"). ECHDC represents that it is the fee owner of the Premises or has entered an agreement to manage the Premises. ECHDC agrees that the right to use the Premises as described in this Agreement will be included in all future instruments and conveyances related to the Premises, including any sale, lease, or license of the Premises, during the Term of this License.
- (b) The Parties expressly agree that this License does not create or convey any right, title or property interest, including any leasehold interest, in the Premises on behalf of the Operator.
- (c) Notwithstanding anything contained in this License to the contrary, the Operator accepts the Premises "AS IS" in the physical condition or state in which the Premises now are without any representation or warranty, express or implied in fact or by law, by ECHDC and without recourse to ECHDC as to the physical nature, condition, zoning or other legal requirements or usability therefore, and ECHDC shall have no obligation to do any work or make any installation, repair or alteration of any kind to or in respect thereof.
- (d) Operator acknowledges that the Premises are public, non-residential spaces and that for all purposes hereunder, the Premises shall remain open to the general public in accordance with its past use except that the Operator may restrict access for specific programs conducted by the Operator provided such programs and such restricted access are approved by ECHDC.

- (e) ECHDC is not required to undertake any work or preparation of the Premises for Operator's use. If any work is required to fit up the Premises in a manner suitable for the Permitted Use, Operator shall perform such work at its own expense. If such work constitutes a Capital Project as defined below, the scope of the project and costs must be reviewed and approved by ECHDC. Operator shall not use any portion of the Premises that is in a condition unsafe or improper for the conduct of the Permitted Use.
- (f) Operator states that its RFP Response identified and accounted for all anticipated revenue sources and business opportunities sought to be captured by Operator. Operator shall not use the Premises for any activity except for those activities included as a Permitted Use. Notwithstanding the foregoing, ECHDC may authorize new or additional activities identified by Operator; Operator shall pay ECHDC an equitable portion of such additional revenue, as determined by good faith negotiations between the parties.

Section 4. Fees

- (a) Annual Fee: Operator shall pay an annual base fee of \$_____ due on or before April 1 of each year during the term. The Annual Fee shall increase by 2% each year.
- (b) For Operator-run Concerts: Operator shall pay ECHDC \$_____ for every ticket sold for Operator-run Concert.
- (c) Third party-run Concerts: Operator shall pay ECHDC a flat fee of \$_____ per Third party-run Concert.
- (d) Sponsorship Revenue: Operator shall pay ECHDC _____% of all Sponsorship Revenue.
- (e) General Revenue: Operator shall pay ECHDC _____% of all General Revenue. General Revenue shall include all revenue earned on the Premises except for Concert Revenue and Sponsorship Revenue as defined by 4 (b), (c) and (d). The cost of Hospitality Services shall be deducted from the General Revenue.
- (f) In the event that the Operator plans on holding a music or entertainment event that it does not believe should be considered a Concert requiring the payment of a fee pursuant to Sections 4(b) or 4(c), it shall notify ECHDC at least 60 days before such an event. If ECHDC notifies the Operator within 10 days thereafter that the event shall be considered a Concert, Operator shall not proceed with such event or shall pay ECHDC the fee required by Section 4(a) of 4(b).
- (g) All payments due under Section 4(b) and 4(c) shall be paid 30 business days after the date on which the Concert is held or the date on which Operator receives payment for such Sponsorship Revenue.
- (h) All Sponsorship Revenue and General Revenue shall be paid quarterly.
- (i) All payments to be made to ECHDC under this License shall be made payable to the Erie Canal Harbor Development Corporation, 95 Perry Street, Buffalo, New York 14203, Attention: Financial Project Manager, or as ECHDC may from time to time direct.

- (j) Operator shall pay all fees promptly when due without notice or demand therefore, and without any abatement, deduction or set off for any reason whatsoever. Fees shall be paid to ECHDC in lawful money of the United States by, at Operator's election, either (i) good and sufficient check (subject to collection) drawn on a bank which is a member of the New York Clearing House Association, or a successor thereto, or (ii) wire transfer to an account designated by ECHDC.
- (k) No payment by Operator or receipt by ECHDC of a lesser amount than that provided herein shall be deemed to be other than on account of the earliest stipulated fee; nor shall any endorsement or statement on any check or any letter accompanying any check or payment as a fee be deemed an accord and satisfaction, and ECHDC may accept such check or payment without prejudice to ECHDC's right to recover the balance of such Fee or pursue any other remedy provided herein.
- (l) The obligation of Operator to make payments of all fees arising during the Term shall survive the expiration or earlier termination of this license.

Section 5. Operator Improvements

- (a) Operator shall undertake no excavations or construction, nor make any alterations, additions or improvements to or installations upon the Premises without the prior written permission of ECHDC. All such work shall be done subject to and in accordance with the terms and conditions of this license and in accordance with all Legal Requirements.
- (b) Operator shall not install any personal property, furniture, fixtures or equipment on the Premises without the prior written permission of ECHDC.
- (c) Operator shall be responsible, at its own expense, for any design, planning, technical analyses, construction work and/or other work necessary to comply with any required local, state, or federal law, regulation, review, consultation and/or permit requirement associated with an Operator-proposed excavation/construction, alteration, addition or improvement to or installation upon the Premises.
- (d) Operator shall cause all work to be performed in a good and workmanlike manner and in accordance with the Legal Requirements. Upon ECHDC's written request, Operator shall promptly commence to reconstruct or replace and diligently pursue to completion, at its sole cost and expense, prior to or after completion of such work, any work which is not done substantially in accordance with what was approved by ECHDC.
- (e) The ECHDC will provide the Operator with a tax-exempt certificate to be used on all Capital Projects.
- (f) Upon the expiration of this Agreement, all permanent, non-removable improvements, permanent, non-removable alterations and permanent, non-removable additions made to the Premises ("Capital Projects") shall become the property of ECHDC.

Section 6. General Operating Requirements

- (a) *Obligation to Operate.* Operator agrees that it shall operate activities on the Premises that are defined as a Permitted Use through the Term.
- (b) *General Operating Standards.* Operator shall conduct an industry-standard operation and shall furnish and maintain all necessary and proper equipment, fixtures, personnel, supplies, and materials required to do so. Operator shall conduct all its operations in an orderly manner and so as not to annoy, disturb, or be offensive to other operators or patrons of the Premises. Operator warrants that any food, food products, merchandise, and other goods and services; sold or kept for sale under this Agreement will be in accordance with industry standards and will conform in all respects to applicable federal, State and local laws, regulations, ordinances, and codes. All goods and services offered for sale must be in good taste. If in ECHDC's reasonable judgement any good or service offered by Operator is not in good taste, at ECHDC request, Operator and ECHDC shall review and mutually agree upon a good or service that is in good taste.
- (c) The Parties agree to work together to develop a diverse and broad range of activities to be conducted on the Premises with the goal of activating the Premises for use by the general public. Any and all proposed operations conducted by the Operator on the Premises shall be subject to review and approval by ECHDC in accordance with the following:
 - (i) Annually by March 1, the Operator shall provide a draft plan for the season {the "Annual Management Plan") which shall include a program calendar, marketing plan, staffing plan, food and beverage plan, merchandise plan and a safety and security plan.
 - (ii) The Annual Management Plan must be approved by ECHDC and such approval may not be unreasonably withheld, conditioned, or delayed by ECHDC.
 - (iii) An updated Annual Management Plan, addressing ECHDC all comments, shall be submitted no later than April 1.
 - (iv) The Operator shall update the Annual Management Plan, seasonally or as needed, to reflect any changes during the year. Any material changes to the Annual Plan that involves an event hosting greater than 2,000 persons shall be subject to ECHDC's approval, such approval not to be unreasonably withheld, conditioned, or delayed. The Operator shall make reasonable efforts to provide a minimum four weeks' notice, or as soon as is practicable, for any such revisions to the Annual Plan.
- (d) *Fire Safety Standards.* Operator shall comply with all current and future regulations, requirements, orders, and directions of the National Fire Protection Association and the New York Fire Insurance Rating Organization, and of any other board or organization exercising similar functions, that apply to the Operator's Use in the Premises.

- (e) *Operating Licenses.* Operator shall obtain and maintain all necessary licenses, certificates, permits, or other governmental authorization for the Permitted Use, and shall provide for the inspection and review of such governmental authorizations by ECHDC and other persons authorized by law. Operator shall comply with all current and future governmental laws, regulations, codes, or orders applicable to the Operator's conduct or its occupancy of the Premises.
- (f) *Payment of Taxes.* Operator is solely responsible for and shall pay in a timely manner all applicable taxes related to Operator's business.
- (g) *Hours of Operation.* In general, Operator shall conduct the Permitted Use from dawn to 11:00 pm ("**Normal Business Hours**"). If Operator desires to operate outside Normal Business Hours, it may do so subject to security staffing and as long as proper safety measures are in place (i.e. lighting).
- (h) *Fireworks.* Operator shall not undertake or permit any firework displays or performances involving pyrotechnics of any kind without the specific prior written approval of ECHDC (such approval not to be unreasonably withheld, conditioned, or delayed). Operator shall be responsible to obtain all applicable state and local permits as may be required for any firework displays. In addition, Operator shall require any vendor providing such services to provide insurance as required by ECHDC.
- (i) *Closures.* ECHDC may require the Operator to temporarily close a portion of the Premises for ECHDC to make emergency repairs, alterations, changes or improvements to the Premises ("Emergency Work"). In such cases, ECHDC agrees to alert the Operator to the closure as soon as they become aware when and where Emergency Work needs to be performed. For non-emergency repairs, alternations, changes, or improvements to the Premises ("Non-emergency Work"), ECHDC agrees to provide at least 6-months' advance written notice and make all commercially reasonable efforts to not perform Non-emergency Work from Memorial Day to Labor Day. If Non-emergency Work needs to occur from Memorial Day to Labor Day, ECHDC agrees to get prior written approval from the Operator and make all commercially reasonable efforts to not interrupt scheduled programming to perform such work.
- (j) *Information Security.* To the extent applicable to Operator, Operator shall comply with the provisions of the New York State Information Security Breach and Notification Act, General Business Law Section 899-aa.
- (k) *(k) Signage.* ECHDC has adopted a uniform style of signage for its properties and may erect, display, or change signage owned by the ECHDC at the Premises at its sole discretion so long as any approved sponsorship elements remain in place. Operator shall not erect, display or change any advertising, identifiers or other signs at or on the exterior of the Premises or elsewhere in the Premises without the prior written consent of ECHDC, excluding any signage that is included within the agreed upon sponsorship signage in Exhibit __. Any signage purchased by the Operator that ECHDC wishes to change will require prior written approval of the Operator. This Section 4(k) excludes temporary signage. Operator shall have the right to review and approve all signage that contains any rules, regulations, warnings, and the like prior to being erected, published, printed, or

posted at the Premises, such approval not to be unreasonably withheld, conditioned, or delayed. At the end of the Term, any signage erected by the Operator shall be removed by the Operator unless ECHDC requests, in writing, otherwise.

- (l) *Website, Social Media and Email Addresses* Operator shall be responsible for including all Buffalo Waterfront programs and activities on ECHDC's 'Buffalo Waterfront' website. Operator shall be responsible for social media promotion of Buffalo Waterfront programs and activities using ECHDC's 'Buffalo Waterfront' accounts (including, but not limited to, Facebook, Instagram, and Twitter) ECHDC reserves the right to require Operator to use @buffalowaterfront.com email addresses when conducting all business.
- (m) *Concerts.* The Operator will be required to host minimum of seven (7) Concerts in 2024 and a minimum of ten (10) each year thereafter.

Section 7. Operator Responsibilities

- (a) Operator shall comply with all Legal Requirements applicable to the conduct of the activities authorized by this Agreement, including all applicable governmental regulations regarding the sale, use, and storage of foodstuffs, beverages, alcohol, and fuel.
- (b) Operator shall implement policies to address the environmental impacts of its operations, including, without limitation, those on the use of non-biodegradable material, the purchase of "green" products, and the conservation of energy. Consistent with such policies, at a minimum the Operator:
 - (i) shall use recyclable materials whenever practicable.
 - (ii) shall provide appropriate receptacles to allow for separation of plastic recycling material from other trash and debris; and
 - (iii) shall not provide or distribute Styrofoam products or single-use plastic bags, drinking straws or drink stirrers, except that Operator shall provide plastic drinking straws upon request to customers.
- (c) Operator shall make reasonable efforts to purchase goods and services from New York State businesses and suppliers sourcing products from New York State businesses, including minority- and women-owned businesses certified by Empire State Development, and service-disabled veteran owned businesses certified by the Office of General Services.
- (d) Operator shall not commit any nuisance on the Premises or do or permit to be done anything which may result in the creation or commission of a nuisance on the Premises. Operator shall not cause or produce, nor allow to be caused or produced, any unusual, noxious, or objectionable smoke, gas, vapor, odor, or noise on the Premises, nor allow the same to permeate the Premises or emanate therefrom.
- (e) Operator shall not use or connect any equipment or engage in any activity or operation that will cause or tend to cause an overloading of the capacity of any existing or future utility, mechanical, electrical, communication, or other system or portion thereof serving the Premises; nor shall Operator do or permit to be done anything that might interfere with

the effectiveness or accessibility of existing and future utility, mechanical, electrical, communication, or other systems or portions thereof on the Premises or elsewhere. Operator shall connect all electrical appliances directly to an electrical outlet or fused power strip

- (f) Operator shall not discharge any acids, vapors, or other harmful materials into the water lines, vents, or flues of the Premises. Operator shall not use the water and wash closets and other plumbing fixtures for any purpose other than those for which the same were designed and constructed, and shall not throw or deposit any sweepings, rubbish, rags, acids, or other foreign substances therein. Operator shall not store, sweep, or throw anything into the shared common or public areas of the Premises, or into or upon any heat or ventilating vents or registers in the Premises, or into any plumbing apparatus in the Premises, or onto any buildings or land adjoining the Premises.
- (g) Operator shall not use or store, or permit the use or storage, at the Premises of any explosives of any kind, illuminating oils, oil lamps, turpentine, benzene, naphtha, or other similar hazardous materials or substances. Operator shall properly handle, store, and use all fuel, including propane tanks, Sterno or other portable warming fuel and apparatus.
- (h) Operator shall not place objects against glass partitions, doors or windows, ceilings or floors, or walls in a manner that is unsightly from any exterior within the Premises and shall mutually agree and meet with the ECHDC prior to removal. Operator will use standard business practices when storing items. Operator shall not install or place or permit to be installed or placed or any flashing, blinking, neon, or animated signs or lights in windows or areas visible to public view.

Section 8. Property Operations and Maintenance

ECHDC holds separate agreements for the Facilities Management and the Grounds Management. Operator will be required to meet with ECHDC and ECHDC's Facilities and Grounds Management teams on a mutually agreed upon basis for coordination purposes. ECHDC utilizes property management software to track work orders, asset inventory, inspections, capital projects and preventative maintenance items. Operator will be expected to use this software at the discretion of the ECHDC.

- (a) **Parking, Roadways and Emergency Access**
 - (i) Parking and roadways are to be kept clear and unobstructed daily. Event set up for parking and vehicle circulation is to be restored to typical traffic pattern by the following morning.
 - (ii) Emergency access routes are to be always maintained and modified as needed for programs.
 - (iii) There is snow removal service provided at Canalside but no snow service at the Outer Harbor. Operator is responsible for snow removal at the Outer Harbor to accommodate programming events.

- (b) Landscape, Environments and Trails
 - (i) ECHDC's Grounds Manager are responsible for lawn care, landscape beds and habitat restoration areas, edging, mulch, tree care, invasive species management, trail maintenance, permanent fences and gates, seasonal maintenance, and irrigation.
- (c) Housekeeping and Sanitation
 - (i) Operator shall keep the programmed areas, food & beverage, and merchandise locations in a clean, orderly and sanitary condition daily during the operating season and as needed during the off season.
 - (ii) Operator shall adhere to all applicable State and local health and sanitary codes, standards, regulations, and inspections. If, at any time, the Operator receives a citation issued by any State or local health agency, Operator shall notify ECHDC and correct the deficiency, in the required timeframe, at its own expense.
 - (iii) Public restrooms existing at Wilkeson Pointe, Bell Slip and Lakeside, will be opened, and closed daily by ECHDC's Facilities and Grounds Management, April 1 - November 1. Facilities and Grounds Management is responsible for daily janitorial services, such as cleaning, supplies and minor repairs.
- (d) Waste Removal
 - (i) Operator shall be responsible for the collection, handling and removal of all waste, recycling and other refuse generated from their Use of the Premises. Litter in landscapes and along trails left because of Operator's Use is to be collected and disposed of by the Operator. Operator is to implement a recycling program to be approved by ECHDC, such approval not to be unreasonably withheld, conditioned, or delayed. Operator shall make reasonable efforts to screen permanent waste collection holding areas, not including temporary receptacles related to large events.
 - (ii) ECHDC's Facilities and Grounds Management is responsible for daily waste removal from receptacles along the Greenway Trail system and public restrooms.
- (e) Utilities
 - (i) Operator acknowledges that there are limited utility services to the Premises. The following utilities shall be paid for and maintained by ECHDC: electricity, water, gas, and sewer.
 - (ii) Operator is responsible for any internet, television, and telephone services to the Premises.
 - (iii) ECHDC's Facilities and Grounds Management is responsible for utility system maintenance, seasonal shutoff and activation of utilities and maintenance of exterior light fixtures and lamping throughout the Premises. Operator is responsible for event lighting, seasonal/decorative lights and interior light fixtures at Terminal B "green room" building and Wilkeson Point restaurant.

(f) **Maintenance and Repairs**

- (i) Operator shall maintain the Premises in safe, operable, and inviting condition at all times and maintain and keep the Premises in good and acceptable repair.
- (ii) Except as otherwise specifically set forth in this Agreement, ECHDC shall perform all capital, structural, and routine repairs, replacements, and maintenance as needed on a turnkey basis at its own cost, including such work that is required as a result of vandalism or other destructive acts, excluding Operator Improvements as described in Section 5 and any sponsorship elements.
- (iii) Limited solely to the Operator programming, food & beverage, and sponsorships and activities anticipated by this Agreement, Operator is responsible for maintenance and repair of the Premises and Operator shall, at its own expense, maintain or cause to be maintained, and shall keep or cause to be kept, the Premises in a good, safe, clean and orderly condition and repair. The Premises shall be maintained, repaired and operated in accordance with all applicable law.
- (iv) Operator shall at its sole cost repair, replace, rebuild, or repaint, as necessary, any part of the Premises that is damaged or destroyed by the acts or omissions of Operator, Operator's business invitees, or other persons who are at the Premises at Operator's invitation, including Operator's programming. In the event of such damage or destruction, Operator shall notify ECHDC within three business days. If such work constitutes a Capital Project, the scope of the project and costs must be reviewed and approved by ECHDC.
- (v) All product data information, manuals, service requirements and warranty information is to be provided to ECHDC for any new installation or modification to the environment, equipment, machinery and fixtures. Additionally, the ECHDC should provide the same information for any current or new mechanicals, equipment, furnishings, and fixtures that the Operator is responsible to maintain.

Section 9. Qualified Staff

- (a) Operator shall employ all necessary staff in sufficient force to conduct the Permitted Use properly, efficiently, and to the high standards for operation required by this Agreement. Operator shall employ only duly qualified and competent staff, including professional and experienced managers to oversee and administer the operation of the Premises.
- (b) Operator's staffing plan for Start Up and Hospitality Services is attached hereto as Exhibit E: "Staffing Plan". In addition, Operator agrees to have staff fill out time sheets to track their time between Canalside and the Premises. ECHDC reserves the right to audit these time sheets at any time upon reasonable request and Operator will not unreasonably withhold such time sheets.
- (c) Operator's employees and contractors must be able to communicate effectively with ECHDC, the public, vendors, public safety personnel, and all others with whom they must interact in the course of their employment.

- (d) Operator is solely responsible for the recruitment and screening of personnel and verification of credentials. Except when prohibited by applicable law:
 - (i) Operator shall check each prospective personnel against the Official New York State Sex Offender Registry maintained by the New York State Division of Criminal Justice Services.
 - (ii) Operator shall not hire or retain any person who:
 - a. Refuses to provide the names of references, documentation of credentials, information on criminal conviction records, or any other requested information that bears on the applicant's fitness to work with or in close proximity to the public, including children; or
 - b. Has not completely and truthfully reported information concerning their criminal convictions; or
 - c. Subject to and consistent with Article 23-A of the New York State Correction Law, whose criminal convictions record directly bears on their fitness to work with or in close proximity to the public, including children, or whose employment would involve an unreasonable risk to the safety or welfare of the public, including children; or
 - d. Who has been the subject of, or who is the subject of an ongoing investigation pursuant to, an indicated child abuse and maltreatment report on file with the Statewide Central Register of Child Abuse and Maltreatment maintained by the New York State Office of Children and Family Services.
- (e) Operator shall train its employees in appropriate operational procedures and standards, including, as applicable and without limitation, pricing definitions; item specifications; housekeeping and maintenance standards; courtesy, guest relations, and speed and manner of customer service; personal appearance; safety; and individual job performance. Operator shall additionally train its managerial employees in quality and cost controls; marketing and advertising; supervision; and accounting and cash control procedures.
- (f) (If applicable) Operator shall arrange for all employees involved in the preparation and serving of food to be certified through the ServSafe® program offered by the National Restaurant Association or an equivalent industry standard approved by ECHDC, such approval not to be unreasonably withheld, conditioned, or delayed.
- (g) Operator shall provide its employees with proper identification credentials and distinctive attire or uniforms that foster a neat and appropriate public image. Uniforms must adhere to Canalside, Outer Harbor, and Buffalo Waterfront Brand standards and include such logos.
- (h) Operator shall take prompt and appropriate action in response to complaints about the conduct, demeanor, or appearance of its employees, contractors, customers, and other business invitees. Upon the reasonable request of ECHDC, Operator shall, as soon as reasonably practicable, take all reasonable steps necessary to remove or otherwise resolve the cause of such complaints.

Section 10. Sale of Alcoholic Beverages, Cannabis and Tobacco Products

- (a) Operator may sell alcoholic beverages at the Premises so long as it obtains and holds the applicable New York State Liquor Authority license. Operator must comply with the terms of its liquor license in all serving or sale of alcoholic beverages and shall provide industry-standard alcohol service training to all employees serving alcohol.
- (b) Operator shall not sell or advertise any cannabis or tobacco products, including electronic nicotine delivery systems or vapes; or faux-tobacco products (e.g., candy cigarettes, bubble gum cigars) at the Premises.

Section 11. Financial Records

- (a) Operator shall keep books and records of account for its Use at the Premises ("Financial Records") in an electronic format in accordance with generally accepted accounting principles. Operator shall keep its Financial Records for the balance of the calendar year in which they were made and for three additional years thereafter.
 - (i) During the term of this Agreement and for three years thereafter, ECHDC, the Office of the State Comptroller, the Office of the Attorney General, and their authorized representatives and contractors (collectively, "State Auditors") may inspect and audit Operator's Financial Records during at any time during Normal Business Hours upon at least 24 hours' prior written notice. As part of such an inspection or audit, the inspector or auditor may make copies of Operator's Financial Records.
 - (ii) Operator shall properly record all of Operator's sales of any nature within the Premises.
- (b) Monthly, within fifteen business days of Operator's financial month end closing, Operator shall cause to be made and delivered to ECHDC a statement detailing the Gross Revenue. Such report will use standard profit/loss financial statements associated with programs occurring on the Premises, including but not limited to, statistics associated with parking volume, concessions, retail and sponsorship. Report will also include timesheets of staff who work at both the Premises and Canalside.
- (c) On or before March 15th of each year, Operator shall cause to be made and delivered to the ECHDC an annual statement of Gross Revenue for the immediately preceding year of the Term. If such report reveals that Operator has either underpaid or overpaid the Percentage Fee due the ECHDC hereunder, then any amounts due the ECHDC shall be paid with said report, and any overpayment shall be deducted from the Percentage Fee payments next due the ECHDC upon issuance of a credit memorandum by the ECHDC provided that there are such Percentage Fee payments due ECHDC, else any overpayment amounts due the Operator shall be paid by ECHDC within thirty business days of a request received from Operator.
- (d) On or before the end of each fiscal year, ECHDC reserves the right to conduct an independent audit to determine the correctness of the computation of the Percentage Fees paid to ECHDC for the preceding year(s). The fees associated with the audit shall be

paid by Operator. If as a result of such inspection and audit, it is established that additional payments are due, Operator shall pay such additional fees to the ECHDC upon written demand made by ECHDC.

Section 12. ECHDC not Liable for Injury, Damage, etc.

- (a) Limited to the Operator hospitality services, programming, food & beverage, merchandise, and sponsorship activities anticipated by this Agreement, and except as expressly set forth in this Agreement, ECHDC shall not in any event whatsoever be liable for any injury or damage to Operator or to any other person happening on, in or about the Premises and its appurtenances during the term of this License, nor for any injury or damage to the Premises or to any property belonging to Operator or to any other Person which may be caused by a fire or breakage or which may arise from any other cause during the term of this Agreement, except to the extent caused by the negligence or intentional conduct of ECHDC or ECHDC's agents or employees.
- (b) Limited to the Operator hospitality services, programming, food & beverage, merchandise, and sponsorship activities anticipated by this Agreement, and except as expressly set forth in this Agreement, and except to the extent caused by the negligence or intentional conduct of ECHDC or ECHDC's agents or employees, ECHDC shall not be liable to Operator or to any other Person for any failure of water supply, gas or electric current, nor for any injury or damage to any property of Operator or of any other Person or to the Premises caused by or resulting from gasoline, oil, steam, electricity, or hurricane, tornado, blizzard, flood, wind or similar storms or disturbances, or water, rain or snow which may leak or flow from the street, sewer, gas mains or subsurface area or from any part of the Premises, or leakage of gasoline or oil from pipes, appliances, sewer or plumbing works therein, or from any other place, nor for interference with light or other incorporeal hereditament by anybody, or caused by any public or quasi-public work.
- (c) Limited to the Operator hospitality services, programming, food & beverage, merchandise and sponsorship activities anticipated by this Agreement, and except as expressly set forth in this Agreement, and except to the extent caused by the negligence or intentional conduct of ECHDC or ECHDC's agents or employees, ECHDC shall not be liable to Operator or to any other Person for any injury or damage to any property of Operator or of any other Person or to the Premises, arising out of any sinking, shifting, movement, subsidence, failure in load-bearing capacity of, or other matter or difficulty related to, the soil, or other surface or subsurface materials, on the Premises; and Operator shall assume and bear all risk of loss with respect thereto.

Section 13. Indemnity and Claims

- (a) Operator agrees to defend, indemnify and hold harmless the State of New York, ECHDC, ESD, Facilities and Grounds Management, Western New York Mountain Bike

Association and their officers, employees, agents, and assigns ("the Indemnitees") from and against all claims, suits, losses, damage, or injury to persons or property of whatsoever kind and nature, whether direct or indirect, that are caused or contributed to by Operator or Operator's contractors, vendors, employees, agents, and invitees and that arise out of Operator's negligence or willful misconduct; provided, however, that Operator's indemnity will not extend to any claims, suits, losses, damage, or injury to persons or property attributable to the negligence or willful misconduct of any Indemnatee.

- (b) For all purposes hereunder, ECHDC will not be liable for any injury, loss, or damage to Operator or to Operator's contractors, vendors, employees, agents, and invitees or to any person happening on, in, or about the Licensed Premises or its appurtenances, nor for any injury or damage to the Premises or to any property belonging to Operator or to any other person, that may be caused by fire, theft, breakage, vandalism, or any other use or misuse or abuse of any portion of the Premises, including but not limited to any common areas, sidewalks, roads, or water in or adjacent to the Premises, or that might arise from any other cause whatsoever, unless and only to the extent of the proportion of which any such injury, loss or damage is determined to be caused by the negligence or willful misconduct of ECHDC.
- (c) For all purposes hereunder, ECHDC will not be liable to Operator or to Operator's contractors, vendors, employees, agents, and invitees or to any other person for any failure of water supply, gas supply, or electric current, nor for any injury or damage to any property of Operator or any other person or to the Premises caused by or resulting from spill or release of gasoline, oil, steam, gas, or electricity; leakage of any substance from pipes, appliances, sewers, or plumbing works; hurricane, flood, tornado, wind, or similar storm or disturbance; water, rain, or snow that might leak or flow from the street, sewers, or subsurface areas, or from any part of the Premises or any body of water within or adjacent to the Premises; or any public or quasi-public work, unless and only to the extent of the proportion by which any such injury, loss, or damage is determined to be caused by the negligence or willful misconduct of ECHDC.
- (d) The obligations of the Operator under this Section shall not be affected in any way by the absence in any case of covering insurance or by the failure or refusal of any insurance carrier to perform any obligation on its part under insurance policies affecting the Premises. All amounts owed to ECHDC under this Section shall constitute an Additional Fee under this License.
- (e) If any claim, action, or proceeding is made or brought against any of the Indemnitees by reason of any event for which Operator has agreed to indemnify the Indemnitees then, upon demand by ECHDC, Operator shall, and in the absence of such demand, Operator may, at its option, resist or defend such claim, action or proceeding (in such Indemnatee's name, if necessary) by the attorneys for Operator's insurance carrier (if such claim, action or proceeding is covered by insurance maintained by Operator) or (in all other instances) by such attorneys as Operator shall select and ECHDC shall approve, which approval shall not be unreasonably withheld, conditioned, or delayed. Operator shall not enter into any

settlement of any such claim without the prior consent of ECHDC, and all of such affected Indemnitees, which shall not be unreasonably withheld, conditioned, or delayed, and only if such parties are released from all liability in connection with such claim and none of their interests are prejudiced by such settlement. Notwithstanding the foregoing, each of the Indemnitees may engage its own attorneys to defend it or to assist in its defense, but Operator shall be liable only for the fees and disbursements of ECHDC's attorneys and only for ECHDC's attorneys if Operator has not retained attorneys. If Operator does not undertake the defense of the claim, then ECHDC may enter into any settlement of such claim provided that Operator is not materially adversely affected by any such settlement.

- (f) This Section and all other indemnity provisions elsewhere in this License shall survive the expiration or earlier termination of this License.

Section 14. Intellectual Property

- (a) ECHDC is the owner of several marks associated with the Premises, including the marks identified in Exhibit ____ (the "Marks"). ECHDC hereby grants Operator a nonexclusive, nontransferable, royalty-free right to use the Marks during the term of this Agreement for promotional and merchandising purposes related to the Permitted Use.
- (b) ECHDC may at all reasonable times inspect Operator goods, services, and promotional activities and materials employing the Marks to ensure that Operator's use of the Marks is of proper quality and otherwise consistent with this Agreement. If ECHDC determines that Operator's use of the Marks is inconsistent with ECHDC's standards or adversely impacts the reputation, image, mission, or integrity of ECHDC, ECHDC may impose reasonable additional conditions on Operator's use of the Marks including, without limitation, a right of ECHDC to pre-approve Operator's use of the Marks.
- (c) At the termination of this Agreement all right of Operator to use the Marks will immediately terminate and Operator shall immediately cease its use of the Marks. Although the rights granted by this section are not assignable and may not be sublicensed, Operator may contract with a third-party for production of merchandise and promotional materials using the Marks.
- (d) Operator acknowledges that ECHDC is the owner of the Marks and any related word and/or design marks now used by ECHDC or that may be developed and used by ECHDC in the future ("Related Marks"). Operator shall not oppose or undertake any other actions or proceedings adverse to ECHDC's use, registration, or application for registration of any of the Marks or any Related Mark. Operator shall not register or apply to register the Marks or any Related Mark or any other terms of designs confusingly similar thereto with the United States Patent and Trademark Office, the State of New York, or any other jurisdiction administering a register of trade and/or service marks. Any rights asserted by Operator in the Marks will vest in ECHDC and

any goodwill from the use of the Marks by Operator will inure solely to the benefit of ECHDC.

- (e) Except for the descriptive use of the facility name in its advertising and the rights specifically granted in this section, Operator shall not use any ECHDC, Empire State Development or State of New York logo, trademark, or other intellectual property.

Section 15. Sponsorships

- (a) Certain Sponsorship elements have been pre-approved in part or in whole. Pre-approved elements are included in this Agreement in Exhibit _____. Any additional Sponsorships and corresponding elements will require prior approval of ECHDC.

Section 16. Condition of the Premises

Except as otherwise expressly set forth in this License, (i) no representations, statements or warranties, express or implied, have been made by or on behalf of ECHDC in respect of the Premises, the status of title thereof, the physical condition thereof, the zoning or other laws, regulations, rules and orders applicable thereto, taxes, or the use that may be made of the Premises and (ii) Operator acknowledges that Operator has relied on no such representations, statements or warranties, and ECHDC shall in no event whatsoever be liable for any latent or patent defects in the Premises.

Section 17. Advertising

- (i) Operator shall use commercially reasonable efforts to promote its use of the Premises. Per Section 6 of this Agreement, the Operator shall develop as part of the Annual Management Plan and submit to ECHDC for review and approval, a draft marketing plan describing media and promotional tools to be used, and amounts spent, in promoting the Use and the Premises, such approval shall not be unreasonably withheld, conditioned, or delayed. Operator shall implement such plan as approved by ECHDC.
- (ii) ECHDC reserves the right to require Operator to use a standard design, style, template, or format, as mutually agreed upon by ECHDC and Operator, in all advertisements and other promotional materials, including website design and social media. ECHDC may, after reasonable discussion with Operator regarding a resolution to the problem, prohibit any permanent advertising sign by Operator that, in the sole judgement of ECHDC, impairs the aesthetics of the Premises or that restricts the movement of patrons in the area. This excludes any elements pre-approved as referenced in Section 15.

Section 18. Coordination with ECHDC

Operator shall cooperate with ECHDC and Facilities and Grounds Management with respect to the operation and maintenance of the Premises. Operator shall meet with ECHDC on a regular basis to

review, plan, and improve the development, construction, maintenance, and operation of the Premises. Operator shall also attend regular coordination meetings with the Canalside Management Team, Facilities Management Team and Grounds Management team as reasonably needed.

Section 19. Insurance

- (a) At all times throughout the term of this License, Operator shall maintain, and comply with the terms of, insurance, with insurers licensed to do business in the State of New York and reasonably acceptable to ECHDC and generally recognized as being responsible, against such risks, loss, damage and liability and for such amounts as are customarily insured against by other enterprises of like size and type as that of Operator, including, without limitation:

- (i) Workers' Compensation Insurance:

Workers' Compensation - Statutory Limits; Employer's Liability

Employer Liability Limits:

1. \$1,000,000 Bodily Injury each Accident
2. \$1,000,000 Bodily Injury by Disease – Policy Limit
3. \$1,000,000 Bodily Injury by Disease – Each Employee

Coverage shall include US Longshore and Harbor Workers' Compensation Act Insurance.

- (ii) Commercial General Liability Insurance

Limits of Liability

1. \$1,000,000 Each Occurrence
2. \$2,000,000 General Aggregate
3. \$2,000,000 Products/Completed Operations Aggregate
4. \$5,000 Medical Expense Limit (any one person)
5. \$50,000 Fire Damage Legal liability (any one fire)

Coverage shall be on an Occurrence form and apply to bodily injury and property damage.

1. These limits shall apply on a "per project" basis.
2. Policy shall be written on form CG 00 01 or its equivalent and shall not include any exclusions or limitations other than those incorporated in the standard form.
3. Contractual Liability and Additional Insured Coverage shall not include any limitations for injuries to your own employees.
4. Products and Completed Operations Liability shall be maintained for three (3) years beyond completion and acceptance of the Project.
5. There shall be no XCU exclusion (Explosion, Collapse or Underground),

6. There shall be no "Labor Law" or other gravity related injuries exclusion.
7. Shall include coverage for Independent Contractors
8. Shall include Contractual Liability for liability assumed under this Contract and all other Contracts relative to the Project
9. Delete contractual exclusion, or any other policy exclusions, for work one within 50 Feet of a Railroad, Light Rail, Subway or similar tracked conveyance or provide endorsement CG2417-Contractual Liability-Railroads
10. Additional Insured Endorsements: All commercial general liability policies shall include the ESD and ECHDC as additional insureds pursuant to endorsements satisfactory to ESD and ECHDC.

(iii) Automobile Liability Insurance

\$1,000,000 Bodily Injury/Property Damage Combined Single Limit

Commercial Automobile Liability Insurance to cover all vehicles including owned, non-owned and hired.

(iv) Excess Liability

Limits of Liability: \$25,000,000

Coverage should be at least as broad as and follow form of Employer's Liability, General Liability, and Auto Liability. Policy to include a drop down provision over primary policies.

(v) Security Guards

Limits of Liability: \$1,000,000 Per Occurrence / \$10,000,000 Aggregate

Operator shall maintain or cause to maintain coverage for security personnel.

(vi) Event Coverage

Limits of Liability: \$25,000,000

Operator shall maintain or cause to be maintained, coverage for events produced by third parties or in-house produced events.

(vii) Liquor Liability

Limits of Liability \$25,000,000

Operator shall maintain or cause to be maintained, coverage for in-house beverage facilities, third party events, and any other offerings.

(viii) Crime/Fidelity

Employee theft	\$10,000,000
Forgery or alteration	\$10,000,000
Theft, robbery and burglary (inside and outside premises)	\$10,000,000
Third-party off Premises	\$10,000,000
Computer fraud Money orders and counterfeit paper currency	\$10,000,000

Single loss deductible shall not be more than \$25,000.

- (ix) Property damage insurance, which shall include fire insurance (including extended coverage") and coverage for personal property and vandalism/malicious mischief and other casualties, in an amount not less than the actual replacement cost of any improvements to the Premises.
- (x) Commercial general liability insurance protecting Operator and ECHDC against losses from liabilities imposed by law or assumed in any written contract (including the contractual liability assumed by Operator under this Agreement) and arising from injury or death of a person or persons or damage to the property of others. Such insurance shall be in a minimum amount of One Million Dollars (\$1,000,000.00) combined single limit per occurrence with a \$2,000,000.00 aggregate for bodily injury or death and property damage, and may be effected under overall blanket or excess coverage policies of Operator.
- (xi) Workers' compensation insurance and other employee benefits insurance which Operator is required by law to provide.
- (xii) Must show evidence of Disability insurance coverage at State statutory limits.
- (xiii) The Indemnitees must be named as additional insureds on a primary and non-contributory basis on all of the following policies: Commercial General Liability, Auto Liability and Excess Liability policies.
- (xiv) All policies listed above should include a waiver of subrogation in favor of the Indemnitees.
- (xv) Professional Liability Insurance of \$1,000,000.00 million will be required of any engineer/architect retained by Operator, if any, with respect to improvements on the Premises.

- (xvi) An individual certificate (including hold harmless) must be provided to each of the Indemnitees. All certificates of insurance are due one month (30 days) prior to the scheduled event
 - (xvii) Such other insurance in such amounts and against such other insurable hazards as ECHDC from time to time may reasonably require or to the extent required by Requirements.
- (b) All policies evidencing the insurance required by this Agreement shall provide that:
 - (i) Operator and the Indemnitees shall be designated as insureds or additional insureds as their respective interests may appear, except with respect to workers' compensation insurance, to the extent of the indemnity provisions of this License Agreement;
 - (ii) At least thirty (30) days written notice be given to ECHDC of the proposed nonrenewal, cancellation, lapse, reduction of benefits or material change in coverage relating to the Premises thereof;
 - (iii) The insurance shall be primary insurance without any right of contribution from any other insurance carried by ECHDC;
 - (iv) The amounts of insurance required pursuant to this License shall not be construed to limit the extent of Operator's liability under this License;
 - (v) Operator shall not violate or permit to be violated any of the conditions or provisions of any policy of insurance required by this License, and Operator shall perform and satisfy or cause to be performed and satisfied the requirements of the companies writing such policies;
 - (vi) Operator shall be solely responsible for the payment of premiums notwithstanding that ECHDC or any other party is or may be named as an insured.
 - (vii) The insurance companies affording coverage must be reasonably deemed acceptable to ECHDC throughout the Term. If any insurance company is deemed unacceptable to the ECHDC, ECHDC shall notify Operator of the reasons why such insurance company is unacceptable and, Operator agrees to procure and maintain at its expense coverage with an acceptable insurer as soon as reasonably practicable after notice.
 - (xviii) Operator hereby waives any and every claim for recovery from ECHDC for any and all loss of or damage to the Premises or to the contents thereof, which loss or damage is covered by valid and collectible physical damage insurance policies, to the extent that such loss or damage is recoverable under said insurance policies. Inasmuch as this waiver will preclude the assignment of any such claim by subrogation or otherwise, Operator agrees to give to each insurance company which has issued, or in the future may issue, to it policies of physical damage insurance, written notice of the terms of this waiver, and to have said insurance policies properly endorsed, if necessary, to prevent the invalidation of said insurance coverage by reason of said waiver. If Operator shall fail to maintain insurance in effect as required by this Agreement, the waiver of subrogation and release of liability by Operator set

forth in this Article shall be in full force and effect to the same extent as if such required insurance (containing a waiver of subrogation) were in effect.

- (xix) At the time of execution and delivery of this Agreement, Operator shall deliver to ECHDC duplicate originals of insurance certificates containing evidence of compliance with the requirements of this Article. At least thirty (30) calendar days prior to the expiration of any policy of insurance required by this License, Operator shall furnish to ECHDC evidence that the policy has been renewed or replaced or is no longer required by this License, and shall deliver to ECHDC certificates of such renewal or replacement policies as ECHDC may request.
- (xx) The net proceeds of any casualty insurance required by this License shall be payable jointly to Operator and ECHDC and applied toward extinguishments or satisfaction of the liability with respect to which such insurance is written, in accordance with the provisions of this License.
- (xxi) Should Operator retain any subcontractor, consultant, vendor or other entity that is to provide services, programs or otherwise enter the Premises with respect to this Agreement, Operator shall require that such entity defend, indemnify and hold harmless ECHDC and the Indemnitees for its activities related to the Premises and provide insurance as required by ECHDC naming ECHDC and the Indemnitees as additional insured.

Section 20. Mechanics' liens

- (a) Operator shall pay or cause to be paid all costs and charges for work done by Operator or caused to be done by Operator in or to the Premises, and for all materials furnished for or in connection with such work. Operator shall, indemnify ECHDC against, and hold ECHDC and the Premises free, clear and harmless of and from, all mechanic's liens and claims of liens, and all other liabilities, liens, claims and demands on account of such work by or on behalf of Operator. If any such lien, at any time, is filed against the Premises as a result of work performed or caused to be performed by the Operator, Operator shall cause such lien to be discharged of record within twenty (20) days after Operator is in receipt of notice of the filing of such lien. In the event that the Operator fails or refuses to remove such lien of record within such time period by payment, bonding off or payment into court, the ECHDC shall be entitled, but shall not be obligated, to discharge the same of record and all amounts paid by the ECHDC with respect to the same (including reasonable attorneys' fees and disbursements) shall be paid by the Operator to the ECHDC as Additional Rent within twenty (20) days after the ECHDC renders a statement to the Operator with respect thereto. If a final judgment establishing the validity or existence of a lien for any amount is entered, Operator shall immediately pay and satisfy the same. If the Operator fails to pay any charge for which such a mechanics' lien has been filed, ECHDC may, at its option, pay such charge and related costs and interest, and the amount so paid, together with reasonable attorneys' fees and disbursements incurred in connection with such lien, shall be immediately due

from Operator to ECHDC. Nothing contained in this License shall be deemed the consent or agreement of ECHDC to subject the interest of ECHDC to liability under any mechanic's or other lien law. If Operator receives notice that a lien has been or is about to be filed against the Premises or any action affecting title to the Premises has been commenced on account of work done by or for or materials furnished to or for Operator, Operator shall immediately notify ECHDC in writing of such notice.

- (b) At least fifteen (15) days prior to the commencement of any work (including, but not limited to any alterations, additions, improvements or installations) in or to the Premises, by others at the request of the Operator, Operator shall give ECHDC written notice of the proposed work and the names and addresses of the persons supplying labor and materials for the proposed work. ECHDC shall have the right to post notices of non-responsibility or similar notices on the Premises in order to protect ECHDC's fee interest in the Premises against any such liens.
- (c) Except as expressly provided in this Agreement, Operator shall have no power to do any act or make any contract which may create or be the foundation of any lien or other encumbrance upon the estate or assets of, or funds appropriated to, ECHDC or of any interest of ECHDC in the Premises.

Section 21. Assignment

- (a) Neither Operator, nor Operator's legal representatives or successors in interest by operation of law or otherwise, shall assign this License or permit the Premises or any part thereof to be used or occupied by others without the express written authorization of ECHDC which consent may be withheld by ECHDC in its sole and absolute discretion.
- (b) Neither ECHDC, nor ECHDC's legal representatives or successors in interest by operation of law or otherwise, shall assign this License or assign any of ECHDC's rights and obligations contained herein without such assignee assuming all of the same rights and obligations to Operator contained herein or without the express written authorization of Operator which consent shall not be unreasonably withheld or delayed.

Section 22. Surrender

Upon the expiration of the term of this License or upon the termination of Operator's right of possession due to Operator's default, whether by lapse of time or at the option of ECHDC as herein provided, Operator shall forthwith surrender the Premises to ECHDC in good order, repair and condition, ordinary wear excepted, free and clear of all lettings and occupancies caused by Operator, free and clear of all liens and encumbrances caused by Operator, without any payment or allowance whatever by ECHDC on account of or for any Operator improvements erected or maintained on the Premises at the time of surrender, or for the contents thereof or appurtenances thereto. Any interest of Operator in the Operator improvements and additions to the Premises made by Operator, shall, without compensation, allowance, or credit to Operator, become ECHDC's property at the termination of this License by lapse of time or otherwise and such Operator improvements shall be relinquished

to ECHDC, free and clear of all lettings and occupancies, free and clear of all liens and encumbrances and in good condition, ordinary wear excepted. Upon the termination of the Term of this License or of Operator's right of possession Operator shall *remove* its office furniture, equipment, trade fixtures, and furniture and all other items of Operator's personal property on the Premises. Operator shall make appropriate repairs for any material damage to the Premises and/or the Operator improvements caused by any such removal. If Operator shall fail or refuse to remove any such property from the Premises and/or Operator Improvements within thirty (30) days after receipt of notice from ECHDC, Operator shall be conclusively presumed to have abandoned the same, and title thereto shall thereupon pass to ECHDC without any cost either by set-off, credit, allowance or otherwise, and ECHDC may at its option accept the title to such property or at Operator's expense may (i) *remove* the same or any part in any manner that ECHDC shall choose, repairing any material damage to the Premises or Operator improvements caused by such removal, and (ii) store, destroy or otherwise dispose of the same without incurring liability to Operator or any other Person.

Section 23. Rights of Entry and Re-Entry

- (a) In addition to any other rights of entry in this Agreement ECHDC may enter the Premises for the purposes of observing the performance by Operator of its obligations under this Agreement or for the doing of any official act or things which ECHDC may be obligated or have the right to do under this Agreement or in accordance with law. In case of emergency or exigent circumstances threatening the health, safety, or welfare of the public or the physical integrity of the Premises, ECHDC always reserves an unrestricted right of entry to the Premises.
- (b) ECHDC may, as an additional remedy upon the giving of a notice of termination as provided this Agreement, re-enter the Premises and every part thereof upon the effective date of termination without further notice of any kind, and may regain and resume possession either with or without the institution of summary or any other legal proceedings or otherwise. Such re-entry, or regaining or resumption of possession, however, shall not in any manner affect, alter, or diminish any of the obligations of Operator under this Agreement, and shall in no event constitute an acceptance of surrender.

Section 24. Rights Upon Loss from Casualty

- (a) If the Premises suffers a loss or damage from casualty, Operator shall notify ECHDC as soon as reasonably practicable.
- (b) If the loss or damage from casualty does not substantially interrupt or impede Operator's Use, Operator shall proceed with performance of this Agreement.
- (c) If the loss or damage from casualty is to the extent that Operator's Use is substantially interrupted or impeded, ECHDC shall consult with Operator prior to deciding of whether or in what manner the loss or damage can or should be restored to substantially the same

condition as existed prior to such loss from casualty. ECHDC shall make a preliminary determination within 2 business days of the Premises being sufficiently safe to access and make a final determination within 45 days.

- (i) If ECHDC determines that the loss or damage cannot or should not be restored, ECHDC shall inform Operator of such determination and set a date on which the Agreement will terminate. In such event, Operator shall pay ECHDC the remaining amount of Operator's Fees owed to ECHDC out of its share of any insurance proceeds.
 - (ii) If ECHDC determines that the loss or damage can and should be restored, Operator may, within thirty days of ECHDC's determination and by written notice to ECHDC, elect to restore the Premises at ECHDC's sole cost and expense, in which case this Agreement shall continue in force. Operator may apply the proceeds of its required policy of property insurance to the restoration of the Premises. Any restoration work will be deemed a Capital Project. If Operator does not wish to undertake its own restoration of the Premises, Operator shall, within thirty days of ECHDC's determination, provide ECHDC with written notice of its decision and pay to ECHDC the full proceeds it received under its required policy of property insurance and this Agreement will terminate upon written confirmation of receipt of such funds by ECHDC.
- (d) If this Agreement is terminated because of loss or damage from casualty Operator shall pay to ECHDC all fees and other amounts due for the period through and including the date of casualty and the parties shall otherwise finalize all open matters and obligations between them.
- (e) Nothing in this section releases Operator from its obligation to carry the property insurance required by Section 19 - Insurance.

Section 25. Notices; Consents by ECHDC

- (a) All notices permitted or required under this Agreement shall be in writing and shall be transmitted:
 - (i) via certified or registered United States mail, return receipt requested;
 - (ii) by personal delivery;
 - (iii) by expedited delivery service; or
 - (iv) by e-mail.
- (b) Such notices must be addressed as follows or to such different address as the parties may from time- to-time designate:

If to ECHDC:
Chastity O'Shei
Erie Canal Harbor Development Corporation
95 Perry Street, 5th Floor
Buffalo, NY 14203
Telephone: 716-846-8211 Email: chastity.oshei@esd.ny.gov

and

Douglas Janese
Senior Counsel
Empire State Development
95 Perry Street, 5th Floor Buffalo, NY 14203
Telephone: 716-846-8200
Email: douglas.janese@esd.ny.gov

- (c) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address, or in the case of email, upon receipt.
- (d) Any consent by ECHDC permitted or required under this Agreement shall be given by ECHDC unless the provision permitting or requiring such consent expressly provides otherwise. ECHDC shall not unreasonably withhold, condition, or delay any consent or approval requested by Operator.
- (e) Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues, and problems and/or for dispute resolution.

Section 26. ECHDC's Rights to Perform Operator's Covenants

- (a) If Operator is in Default and such Default creates an emergency situation, ECHDC, without waiving or releasing Operator from any obligation of Operator contained in this License, may (but shall be under no obligation to) perform such obligation on Operator's behalf. ECHDC shall give Operator such prior written notice (except in the case of emergency) of ECHDC's performance of such obligations as is reasonable under the circumstances. Any reservation of a right by ECHDC to enter upon the Premises and to make or perform any repairs, alteration, or other work in, to, or about the Premises which is Operator's obligation pursuant to this License, shall not be deemed to (i) impose any obligation on ECHDC to do so; (ii) render ECHDC liable to Operator or any third party for the failure to do so; or (iii) relieve Operator from any obligation to indemnify the ECHDC as otherwise provided in this License. Nothing in this License shall impose any duty upon the part of ECHDC to do

any work required to be performed by Operator under this License, and performance of any such work by ECHDC shall not constitute a waiver of Operator's default in failing to perform the same.

- (b) All sums paid by ECHDC and all third party costs and expenses reasonably incurred by ECHDC in connection with its performance of any obligation pursuant to this License, together with interest thereon at the Default Rate, from the respective dates which are thirty (30) days after the date each such sum, cost, expense, charge, payment or deposit was demanded by ECHDC to be repaid by Operator until the date of actual repayment to ECHDC with such interest, shall be paid by Operator to ECHDC and shall constitute Additional Rent under this License. Any payment or performance by ECHDC shall not be nor be deemed to be a waiver or release of breach or Default of Operator with respect thereto or of the right of ECHDC to terminate this License, institute summary proceedings or take such other action as may be permissible hereunder if an Event of Default by Operator shall have occurred. Damages incurred by reason of Operator's failure to provide and keep insurance in force in accordance with this License shall not be limited to the amount of the insurance premium or premiums not paid, and ECHDC also may recover, as damages for such breach, the uninsured amount of any loss and damage and the costs and expenses of suit, including reasonable attorneys' fees and disbursements, suffered or incurred by reason of damage to or destruction of the Premises.

Section 27. Default

- (a) Any one or more of the following programs shall constitute a "Default" or an "Event of Default" hereunder and ECHDC may, upon the occurrence of such event or at any time, thereafter, terminate this Agreement by giving Operator at least ten (10) days' notice in writing. Upon the date fixed in such notice, this Agreement will come to an end as if said date were the Expiration Date.
 - (i) Operator becomes insolvent; or takes the benefit of any present or
 - (ii) future insolvency statute; or makes a general assignment for the benefit of creditors; or files a voluntary petition in bankruptcy or a petition or answer seeking an arrangement or its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or under any other law or statute of the United States or of any State thereof; or consents to the appointment of a receiver, trustee, or liquidator of all or substantially all its property.
 - (iii) By order or decree of a court, Operator is adjudged bankrupt, or an order is made approving a petition filed by any of the creditors seeking its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or under any law or statute of the United States or of any State thereof.
 - (iv) A petition under any part of the federal bankruptcy laws or an action under any present or future insolvency law or statute is filed against Operator and not be dismissed within 45 days after the filing thereof.

- (v) The actual or purported letting hereunder of the interest or estate of Operator under this Agreement is transferred to, passed to or devolved upon, by operation of law or otherwise, any other person, firm, or corporation except upon the express written approval of ECHDC.
 - (vi) By or pursuant to, or under authority of, any legislative act, resolution, or rule, or any order or decree of any court or governmental board, agency, or officer, a receiver, trustee, or liquidator takes possession or control of all or substantially all the property of Operator; or any execution or attachment is issued against Operator or any of its property, whereupon possession of the Premises shall be taken by someone other than Operator, and any such possession or control continues in effect for a period of 20 days.
 - (vii) Any lien is filed against the Premises because of any act or omission of Operator and is not removed or bonded as provided for in this Agreement.
 - (viii) Operator fails to pay any fee or other amounts due duly and punctually to ECHDC within thirty (30) days after written notice is received by Operator that it is past due; or Operator fails to keep, perform, and observe each and every material obligation set forth in this Agreement on its part to be kept, performed, or observed, within 30 days after receipt of written notice of default thereunder from ECHDC (except where fulfillment of its obligation requires activity over a period of time, and Operator shall have commenced to perform whatever may be required for Operator fails to keep, perform, and observe each and every material obligation set forth in this Agreement on its part to be kept, performed, or observed, within 30 days after receipt of written notice of default thereunder from ECHDC (except where fulfillment of its obligation requires activity over a period of time, and Operator shall have commenced to perform whatever may be required for fulfillment within 30 days after receipt of written notice and continues diligently such performance without interruption except for causes beyond its control).
 - (ix) Operator ceases to be duly authorized to conduct business in the State of New York and does not become authorized to conduct business in the State of New York within 30 days of written notice by ECHDC.
 - (x) Operator is found by ECHDC to have intentionally falsified any information provided to ECHDC, and corrected information is not provided within 20 days of written demand by ECHDC therefor, or Operator is found by ECHDC to have provided intentionally false or incomplete certifications or other representations in its RFP Response.
- (b) ECHDC may also terminate this Agreement with written notice to Operator if any member, partner, director, or officer of the Operator is convicted of any of the following offenses: Bribery Involving Public Servants and Related Offenses, as defined in Article 200 of the New York State Penal Law; Corrupting the Government, as defined in Article 496 of the New York State Penal Law; or Defrauding the Government as defined in Section 195.20 of the New York State Penal Law.

- (c) No waiver by either party of any Default on the part of the other party in performance of any of the terms, covenants, or conditions hereof to be performed, kept, or observed by the other party is or will be construed to be a waiver by a party of any other or subsequent default in performance of any of the said terms, covenants, and conditions. No acceptance by ECHDC of Rent or other amounts due under this Agreement will be construed to be a waiver by ECHDC of any right of the State to terminate this Agreement.
- (d) Operator hereby waives its right to trial by jury in any summary proceeding, ejectment, or other action that may hereafter be instituted by ECHDC against Operator in respect of the Premises or in any action that may be brought by ECHDC to recover fees, damages, or other amounts payable under this Agreement. Operator shall not interpose any claims as counterclaims in any summary proceeding or action for non-payment that may be brought by ECHDC unless such claims would be deemed waived if not so interposed.
- (e) The rights of termination described in this section are in addition to any other rights of termination provided in this Agreement and any rights and remedies that either party would have at law consequent upon any breach of this Agreement by the other party. The exercise by a party of any right of termination will be without prejudice to any other such rights and remedies.
- (f) Operator hereby waives all rights of redemption arising if it is evicted or dispossessed for any cause set forth in this Agreement or if ECHDC obtains or retains possession of the Premises in any lawful manner.
- (g) Operator may terminate this Agreement if ECHDC fails to keep, perform, and observe each and every material obligation set forth in this Agreement on its part to be kept, performed, or observed, within 30 days after receipt of written notice of default thereunder from Operator (except where fulfillment of its obligation requires activity over a period of time, and ECHDC shall have commenced to perform whatever may be required for fulfillment within 30 days after receipt of written notice and continues diligently such performance without interruption except for causes beyond its control).

Section 28. Miscellaneous

- (a) The standard contract provisions identified as Schedule A relating to ESD and ECHDC contracts is hereby attached hereto as Exhibit A and incorporated herein. There are no representations, covenants, warranties, promises, agreements, conditions or undertakings, oral or written, between ECHDC and Operator other than set forth in this Agreement.
- (b) This License may not be changed, modified, amended or terminated orally, but only by a written instrument of change, modification, amendment or termination executed by the party against whom enforcement of any change, modification, amendment or termination is sought.
- (c) This License shall be governed by and construed in accordance with the laws of New York State without regard to conflicts of law principles.

- (d) The agreements, terms, covenants and conditions herein shall be binding upon, and shall inure to the benefit of, ECHDC, Operator and their respective successors and permitted assigns. Except as set forth in the immediately preceding sentence, nothing in this License shall be deemed to confer upon any Person any right or benefit, including any right to insist upon, or to enforce against ECHDC or Operator, the performance of such party's obligations hereunder.
- (e) Nothing herein is intended nor shall be deemed to create a joint venture or partnership between ECHDC and Operator, nor to make ECHDC in any way responsible for the debts or losses of Operator.
- (f) The parties acknowledge and agree (a) that each has substantial business experience and is fully acquainted with the provisions of this License, (b) that the provisions and language of this License have been fully negotiated, and (c) that no provision of this License shall be construed in favor of any party or against any party by reason of such provision of this License having been drafted on behalf of one party rather than the other.
- (g) This License shall completely and fully supersede all other prior understandings or agreements, both written and oral, between ECHDC and Operator relating to use and rental of the Premises.
- (h) If any clause, provision or section of this License shall be ruled invalid by any court of competent jurisdiction, the invalidity of such clause, provision or section shall not affect any of the remaining provisions hereof.
- (i) This License may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.
- (j) Each party does hereby expressly waive all rights to trial by jury on any cause of action directly or indirectly involving the terms, covenants or conditions of this License or the Premises or any matters whatsoever arising out of or in any way connected with this License.
- (k) The provisions of this License relating to waiver of a jury trial and the right of redemption shall survive the termination or expiration of this License.
- (l) Operator and the party executing this License on behalf of Operator each represents to ECHDC that such party is authorized to execute this License for and on behalf of Operator and thereby to bind Operator to all of the terms and conditions of this License. ECHDC and the party executing this License on behalf of ECHDC each represents to Operator that such party is authorized to execute this License for and on behalf of ECHDC and thereby to bind ECHDC to all of the terms and conditions of this License.

Section 29. Claims

- (a) Any and all claims against ECHDC arising out of this Agreement are limited to money damages and will be commenced exclusively in any appropriate court in Erie County, New York, which shall be the sole venue.

- (b) Any and all claims against Operator for damages brought by ECHDC and/or any actions to enforce the terms and conditions of this Agreement shall be enforceable in any appropriate court in Erie County, New York, which shall be the sole venue.

Section 30. Force Majeure; Waiver of Damages

- (a) If either ECHDC or Operator is delayed or prevented from performing any act required by this Agreement by reason of COVID-19 or the consequences thereof which may include, without limitation, requirements under law, quarantines, or other public health concerns as reasonably determined by both parties in its reasonable judgment, epidemic, pandemic, acts of God, weather, earth movement, flood, fire, blizzard, explosion, lockout or labor trouble, acts of war, invasion, hostilities, or terrorism, civil commotion, public emergency, riots, government order or action, eminent domain, condemnation of property, changes in law or regulations, organized labor activities or disturbances, shortages of power, supplies, infrastructure, transportation, or other similar causes ("Force Majeure Programs") without fault and beyond the reasonable control of the party obligated, performance of such act will be excused for the period of the delay and the period for the performance of such act will be extended for a period equivalent to the period of such delay. Nothing in this section, however, excuses the Operator from the prompt payment of the Sponsorship Revenue and any other outstanding fees due to ECHDC with the exception of the Annual Base Fee, which would be reasonably negotiated between the ECHDC and Operator.
- (b) Each party waives any and all claims for compensation from the Operator, State of New York and ECHDC, as applicable, for any and all loss or damage sustained by such party resulting from Force Majeure Programs.

Section 31. Freedom of Information Law

Operator acknowledges that ECHDC is subject to the requirements of the Freedom of Information Law and that any information or records submitted by Operator to ECHDC are presumptively subject to disclosure unless specifically exempted by statute. In accordance with Public Officers Law Section 89(5)(a)(3), ECHDC will maintain any information or records that Operator requests be exempted from disclosure pursuant to Public Officers Law 87(2)(d) apart from all over information or records and, in the event of a request under the Freedom of Information Law for such information or records, shall contact Operator to determine the extent to which such information or records might properly be exempted from disclosure.

Section 32. Non-Discrimination and Contractor & Supplier Diversity

- (a) Pursuant to New York State Executive Law Articles 15-A and 17-B, ESD recognizes its obligation under the law to promote opportunities for maximum feasible participation of certified Minority and Women-owned Business Enterprises ("MWBE") and Service-Disabled Veteran-Owned Businesses ("SDVOB") in the performance of ESD projects

and procurements. The ESD Office of Contract and Supplier Diversity has reviewed the contract and establishes an overall goal of ___% percent for MWBE participation (based on the current availability of MBEs and WBEs) and no goal for SDVOB participation. See Exhibit B: Schedule B for more details.

- (b) Operator shall make a good faith effort to hire local firms and contractors for work performed on the Premises and Erie County residents for any job opportunities generated from operation of the Premises.

Section 33. Failure to Insist Upon Strict Performance

The failure of either party to insist, in any one or more instances, upon a strict performance of any covenant, term, provision or agreement of this License shall not be construed as a waiver or relinquishment thereof, but the same shall continue and remain in full force and effect, notwithstanding any law, usage or custom to the contrary. The receipt by ECHDC of any fee with knowledge of the breach of any covenant or agreement hereunder shall not be deemed a waiver of the rights of ECHDC with respect to such breach, and no waiver by either party of any provision hereof shall be deemed to have been made unless expressed in writing and signed by such party.

Section 34. Rights of Third Parties

Nothing contained in this Agreement creates or gives to third parties any claim or right of action against the Indemnitees, or any interest in real or personal property of the State of New York, beyond that as may legally exist without regard to this Agreement.

Section 35. Agency

Nothing contained in this Agreement constitutes or will be construed to create or constitute a legal or *de facto* partnership or joint venture or an agency relationship between the parties.

Section 36. Integration Clause

This Agreement shall not be materially amended or otherwise modified except in writing signed by both parties. Except to the extent that documents are incorporated herein by reference, this Agreement constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements and understandings of the parties in connection therewith. No covenant, representation, or condition not expressed herein shall be effective to interpret, change, or restrict the express provisions of this Agreement. This Agreement shall be interpreted without construing any provision in favor of or against either party by reason of the drafting of the provision.

IN WITNESS WHEREOF, the parties have executed this License as of the date of last signature.

ERIE CANAL HARBOR DEVELOPMENT CORPORATION

STEVE P. RANALLI, PRESIDENT

DATE

OPERATOR

Name, Title

DATE

*** Attachments Follow***

EXHIBITS:

A: Schedule A

B: Schedule B

C: Buffalo Waterfront “Licensed Premises” Descriptions and Map

D: Sponsorship Guidelines

E: Brand Standards/Marks

F: RFP dated January 19, 2023

G: Operator's RFP Response and Addenda

H: 2024-2025 Annual Management Plan (Draft)